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No. 06-1410

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KRISPEN ESTRADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Idaho

REPLY BRIEF FOR PETITIONER

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A. Certiorari Is Appropriate In This Case Because The Decision Of The Supreme Court Of Idaho Is Based Upon The Fifth Amendment Of The United States Constitution And Expands The No Adverse Inference Rule Far Beyond What Has Been Required Or Even Intimated By This Court

Grant of certiorari is appropriate in this case because this Court has left open the question raised in the petition: whether the no adverse inference rule prohibits a sentencing court from drawing adverse inferences other than in determining facts related to the crime of conviction. (Petition for Writ of Certiorari, pp. 6-13 (citing *Mitchell v. United States*, 526 U.S. 314 (1999).) Estrada opposes the petition, arguing that this ground is not sufficient for granting the writ by claiming (1) that the Petitioner's argument that the precedential value of *Mitchell* has been eroded by subsequent Sixth Amendment cases is flawed (Respondent's Brief in Opposition, pp. 9-12); (2) that the opinion of the Supreme Court of Idaho was based upon adequate and independent state grounds and not upon application of the no adverse inference rule of the Fifth Amendment (id. at 12-23); and (3) that this Court should wait to address this issue in a case in which the defendant actually invoked his right to silence (id. at pp. 29-30). Review of Estrada's arguments for denial of certiorari shows them to be unpersuasive.

1. Certiorari is Appropriate in Part Because the Precedential Value of *Mitchell* has been Eroded by Subsequent Decisions Regarding the Scope of the Sixth Amendment Right to a Jury Trial

In *Mitchell*, the district court found, based in part upon Mitchell's silence, that the amount of cocaine she had

conspired to traffic was "over the 5-kilogram threshold," and thus imposed the mandatory minimum penalty of ten years imprisonment. *Mitchell v. United States*, 526 U.S. 314, 319-20 (1999). One of the grounds (but certainly not the primary one) for granting this petition is that if the fact pattern of *Mitchell* were to repeat itself Mitchell would be entitled to have a jury decide whether the amount of cocaine she conspired to distribute was over the five-kilogram threshold of 21 U.S.C. § 841(b)(1)(A)(ii). *Apprendi v. New Jersey*, 500 U.S. 466 (2000). Because the factual question specifically addressed in *Mitchell* is now a jury question for trial, and not a sentencing question for a judge, the *Mitchell* opinion is currently of questionable utility in determining the extent of the no adverse inference rule in routine sentencing proceedings. (*See* Petition, pp. 12-13.)

In responding to the Petition, Estrada contends that the premise of this argument is flawed. Specifically, Estrada argues that the five-kilogram threshold finding only made a minimum sentence applicable to Mitchell, and did not increase the maximum sentence. (Respondent's Brief in Opposition, pp. 10-12.) This, Estrada argues, means that *Apprendi*, which applies only to factual findings that would increase maximum penalties, would not have granted Mitchell the right to a jury determination that the amount of cocaine involved in the conspiracy met the five-kilogram threshold. (Id. at 12 (citing *Harris v. United States*, 536 U.S. 545 (2002) (no right to jury trial on facts establishing minimum sentences).)

The flaw in Estrada's argument is that it misconstrues federal narcotics law. The five-kilogram threshold finding made Mitchell eligible for a sentence of not less than ten years and not more than life. 21 U.S.C. § 841(b)(1)(A)(ii). Absent a finding of at least five kilograms of cocaine,

however, the applicable *maximum* sentence would have been much less than life. 21 U.S.C. § 841(b)(1)(B) (maximum sentence for distributing more than 500 grams of cocaine is forty years); 21 U.S.C. § 841(b)(1)(C) (maximum sentence for distributing more than fifty grams of cocaine is 20 years). Questions of drug quantity that determine the applicable maximum sentence are elements of the crime requiring submission to a jury. *See, e.g., United States v. Gonzalez*, 420 F.3d 111, 120-31 (2d Cir. 2005); *United States v. Promise*, 255 F.3d 150, 154-57 (4th Cir. 2001) (joining the D.C., 5th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits on this issue); *United States v. Hollis*, ___ F.3d ___, 2007 WL 1760701 (9th Cir., June 20, 2007).

Estrada's argument is without merit; if the fact pattern of *Mitchell* were to re-occur, Mitchell would be entitled to a jury determination of whether the amount of cocaine she conspired to distribute was five kilograms or more because it is an element of the crime. Thus, the determination that Mitchell was entitled to the benefit of the no adverse inference rule in sentencing proceedings is of questionable ongoing utility in cases not involving elements of the crime.

2. The Supreme Court of Idaho Decision in this Case Was Based Upon Federal Constitutional Law, Not Independent and Adequate State Grounds

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This Court will "accept as the most reasonable explanation that the

state court decided the case the way it did because it believed that federal law required it to do so" if the state court decision "fairly appears to rest primarily on federal law" or is "interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . ." *Id.* at 1040-41. The state law ground is rendered clear on the face of the opinion if the court relying on federal precedents "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the state court has reached." *Id.* at 1041.

Estrada argues that the decision of the Supreme Court of Idaho was based upon adequate and independent state grounds because the court cited an Idaho statute, Idaho Code § 19-3003, which makes a criminal defendant incompetent to testify in criminal proceedings without his consent. (Respondent's Brief in Opposition, pp. 12-14.) He also argues that the Supreme Court of Idaho necessarily decided application of the no adverse inference rule on state law grounds (or did not decide the question at all) because it did not specifically state its reasoning. (Respondent's Brief in Opposition, pp. 15-23.) No reading of the Supreme Court of Idaho's opinion, however, supports the conclusion that this case was decided on grounds other than application of Fifth Amendment law.

The Supreme Court of Idaho's opinion specifically states that Estrada's petition for post-conviction relief asserted that his counsel was ineffective "based on his attorney's failure to advise Estrada of his Fifth Amendment privilege to refuse to submit to a court-ordered psychosexual evaluation for sentencing purposes." (Petition App. 1.) The court noted that the district court had

found deficient performance, but no prejudice, based upon its reading of the Fifth Amendment. (Id. at 3-4.) It noted that the parties had "limited their analysis of ineffective assistance of counsel to the federal framework" and stated it was likewise limiting its own analysis.[1] (Id. at 9.) The court repeatedly referenced, cited to, and relied upon the Fifth Amendment and cases interpreting it. (Id. at 10-12.) After exclusive reliance upon federal law, the court, using the signal "*see also*," cited an Idaho statute and case interpreting that statute. (Id. at 11-12.) Although the opinion does reference Idaho law (using a "*see also*" signal) after relying on federal law, such reference, in context, does not amount to a "plain statement" that federal law was only used for guidance and did not control the result.

The court then went on to address the prejudice prong of the ineffective assistance of counsel claim, stated the Sixth Amendment standard for showing prejudice, and concluded that Estrada had met his burden of showing prejudice by "showing that the evaluation played a role in his sentence." (Id. at 13-14.) Significantly, the Supreme Court of Idaho reversed the district court, which had

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[1] Estrada asserts he argued "various statutory and constitutional grounds" in his prejudice claim. (Respondent's Brief in Opposition, p. 17.) The only state law he actually claims he relied on was unspecified "state sentencing statutes" regarding "certain sentencing factors." (Id. at 18; *see also* id. at 4, 5 (citing to same pages of briefing referenced in argument without stating what state law was allegedly referenced).) It is noteworthy that the only Idaho "sentencing statute" referenced in the response brief is to Idaho Code § 19-2521, which sets forth factors to be considered in whether to grant probation (Respondent's Brief in Opposition, pp. 21, 25), and no mention of provisions of the Idaho Constitution is made. These vague and half-supported claims are not sufficient grounds for disregarding the Supreme Court of Idaho's statement that both the parties' arguments and its own analysis were "limited" to the "federal framework."

concluded that Estrada had not met his burden of showing prejudice because the sentencing court could have drawn at least limited negative inferences at sentencing under the Fifth Amendment had Estrada refused to cooperate with the evaluation. (Id. at 42-47.) Estrada's argument that the Supreme Court of Idaho was not addressing the grounds for the only part of the district court's decision it was reversing, or was reversing it on unstated state law grounds when the district court had relied on the Fifth Amendment, is simply without merit.

3. This Case Does Present a Proper Vehicle for Addressing the Fifth Amendment Question of What, if any, Inferences a District Court May Draw from a Defendant's Refusal to Participate in Sentencing Evaluations

Estrada also argues that this case is not a proper vehicle for review of the question of whether adverse inferences can be drawn from a defendant's refusal to cooperate in sentencing evaluations, a question left open in *Mitchell*, because this case did not arise directly from his assertion of silence but instead from his assertion that he would have remained silent had his attorney told him he had that right. (Respondent's Brief in Opposition, pp. 29-30.) This, Estrada argues, would require this Court to engage in the "noetic endeavor" of determining what would have happened if he had invoked his right. (Id. at 30.) Any "noetic endeavor" of determining prejudice from ineffective assistance of counsel under the Sixth Amendment, however, would still fall upon the Idaho courts. The Petition requests this Court to address only the Fifth Amendment question of whether, and what, inferences may be drawn by a sentencing court if a criminal defendant

declines cooperation in sentencing evaluations. Once that determination is made, remand for any further analysis that may be required would be appropriate.

This case presents a significant issue of constitutional law. At present, this Court's jurisprudence provides little guidance on this issue. This is an issue of tremendous importance, especially to states. The State of Idaho therefore respectfully requests that certiorari be granted.

B. Certiorari Is Appropriate In This Case Because The Decision Of The Supreme Court Of Idaho Places Idaho At One End Of A Three-Way Split In How Jurisdictions Apply The No Adverse Inference Rule At Sentencing

As stated in the Petition, courts generally take one of three different positions in relation to application of the no adverse inference rule at sentencing: either that adverse inferences may be drawn except as to the facts of the crime, that adverse inferences may be drawn only in relation to potential grounds for granting a lesser sentence, or that no adverse inferences whatsoever may be drawn. (Petition, pp. 13-17.) Estrada acknowledges that these three groups of authority actually exist, but insists that one group (courts allowing adverse inferences to reject reductions in sentence length) is irrelevant and that another (courts allowing any adverse inferences other than the facts of the crime) is small and inconsistent with subsequent precedent of this Court. (Respondent's Brief in Opposition, pp. 23-29.) Review of Estrada's arguments confirms that there is a three-way split in authority, making certiorari in this case appropriate.

1. Estrada's Argument That Certiorari Should Not Be Granted Because Idaho Has Not Codified Mitigating Factors in Sentencing is Without Merit

Estrada first argues that because Idaho does not have a sentencing scheme with some sort of codified or rule-based criteria for reduction of sentence from a baseline there is no actual controversy in this case. (Respondent's Brief in Opposition, pp. 23-26.) Estrada has failed, however, to establish that lack of codification of specific downward departures in sentencing is relevant to the question of whether granting certiorari is appropriate to resolve the split in authority on application at sentencing of the Fifth Amendment rule against adverse inferences. Even if it were relevant, Idaho law does allow courts to consider mitigating factors in sentencing, even absent codification of how such mitigating factors should be employed to reduce a sentence.

In Idaho, like in most jurisdictions, factors such as remorse and acceptance of responsibility are considered mitigating. *See, e.g., State v. Jones*, 141 Idaho 673, 676-77, 115 P.3d 764, 767-68 (Idaho App. 2005) (rejecting claim that sentence was excessive in light of mitigating factors such as demonstration of remorse and acceptance of responsibility). That such mitigating factors are not specifically codified by statute or rule does not mean that application of the no adverse inference rule would be different in Idaho than in jurisdictions that have chosen to codify downward departures or include them in sentencing guidelines. Estrada has failed to show how the lack of codification of mitigating sentencing factors in Idaho is relevant to the decision of whether to grant certiorari in this case to resolve a split in authorities.

2. Estrada's Argument That Decisions of This Court Have Already Resolved This Split in Authorities is Incorrect

The Petition cites to decisions from state courts that have concluded that the stated holding in *Mitchell* requires application of the no adverse inference rule at sentencing only in relation to factual findings about the circumstances of the crime itself. (Petition, pp. 15-16.) Estrada points out that the cases cited in support of this argument with a "*see also*" signal are not on point. (Respondent's Brief in Opposition, pp. 26-28.) The "*see also*" signal itself, however, shows that these cases were not on point, but merely examples of courts that have used language supportive of the general proposition without directly deciding it. *See The Bluebook, A Uniform System of Citation*, § 1.2, p. 23 (17th Ed., 2000) (Signal "*see also*" means: "Cited authority constitutes additional source material that supports the proposition. . . . [C]ommonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed."); Dickerson, *ALWD Citation Manual, A System of Citation*, § 44.3, p. 300 (2nd Ed., 2003) ("*See also*" signal "may be used when the cited authority supports the point made, but is in some respect distinguishable from previously cited cases."). That the Petitioner has cited to relevant and supportive authority not directly on point does not show a lack of a split in authority or that certiorari should not be granted.

Estrada next argues that courts holding that *Mitchell* applies the no adverse inference rule only to determination of the facts of the crime "should be given the chance to reconsider" in light of *Cunningham v. California*, ___ U.S. ___, ___ n.14, 127 S.Ct. 856, 869 n.14 (2007), "prior to a

determination that there is a conflict of authority on the current law." (Respondent's Brief in Opposition, pp. 28-29.) The cited footnote in *Cunningham* rejects an approach bifurcating "facts concerning the offense" and "facts concerning the offender" for analysis of whether a defendant is entitled to a jury determination under the Sixth Amendment. *Cunningham*, ___ U.S. at ___ n.14, 127 S.Ct. at 869 n.14. The Petitioner respectfully submits that there is no reason to deny certiorari in this case for the purpose of allowing certain state courts to reconsider whether this footnote in a Sixth Amendment decision might change their holdings regarding the scope of the Fifth Amendment.

As established in the Petition (pp. 13-17), there is a three-way split in authority regarding the scope of the no adverse inference rule in sentencing. Granting certiorari to resolve this split on this important issue is appropriate.

Respectfully submitted,

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